No. 92-1223

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.,
PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the Privacy Act of 1974 protects the home addresses of federal employees from disclosure.

PARTIES TO THE PROCEEDING

The petitioners are the U.S. Department of Defense, U.S. Department of Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi, and the U.S. Department of Defense, Army and Air Force Exchange, Dallas, Texas. The respondents are the Federal Labor Relations Authority and the American Federation of Government Employees, AFL-CIO.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 975 F.2d 1105. The opinions of the Federal Labor Relations Authority (Pet. App. 37a-42a and 52a-57a) are reported at 37 F.L.R.A. 652 and 37 F.L.R.A. 930.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1992. A petition for rehearing was denied on December 7, 1992. Pet. App. 35a-36a. The petition for a writ of certiorari was filed on January 19, 1993, and was granted on March 29,

1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552, provides, in pertinent part:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) would reasonably be expected to constitute an unwarranted invasion of personal privacy[.]

2. The Privacy Act of 1974, 5 U.S.C. 552a(b), states, in pertinent part:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
>
> * * * * *
>
> (2) required under section 552 of this title [FOIA];
>
> (3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section[.]

3. The Federal Service Labor-Management Relations Statute, 5 U.S.C. 7114, provides, in pertinent part:

> (b) the duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—
>
> * * * * *
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
>
> * * * * *
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]

STATEMENT

1. This case, which is typical of approximately 60 cases that have been decided by the Federal Labor Relations Authority (FLRA), arises out of requests by two unions for the home addresses of the federal employees in the bargaining units represented by the unions. One request was made by Local 1657 of the United Food and Commercial Workers Union, which represents employees at the Navy Exchange in Gulfport, Mississippi. The other request was made by Local 1345 of the American Federation of Government Empolyees, which represents employees of the Dallas-based Army and Air Force Exchange Service. Pet. App. 2a-3a. Since the unions have the home addresses of their members, the practical effect of the request was to seek the home addresses of members of the bargaining unit who have chosen not to join

the unions. In response to the requests, the relevant agency provided the names and work stations of members of the bargaining unit, but not their home addresses. C.A. App. 58, 60, 113.

The unions sought the home addresses pursuant to 5 U.S.C. 7114(b)(4), part of the Federal Service Labor-Management Relations Statute (Labor Statute), which generally requires federal employers to provide information that is necessary for collective bargaining. The Labor Statute also provides, however, that disclosure is required only "to the extent not prohibited by law." In declining to disclose the employees' home addresses, the agencies relied on 5 U.S.C. 552a(b), part of the Privacy Act of 1974, which generally provides that federal agencies may not disclose any personal information without the consent of the person to whom the information pertains.

While the Privacy Act contains no exception authorizing the release of personal information that is relevant to collective bargaining, Exception (b)(2) of the Privacy Act authorizes the release of information where disclosure is required by the Freedom of Information Act (FOIA). 5 U.S.C. 552a(b)(2). FOIA, in turn, generally mandates the release of agency records, although FOIA Exemption 6 bars the release of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). The unions argued in this case that disclosure of the employees' home addresses would not constitute "a clearly unwarranted invasion of personal privacy" under Exemption 6, so that disclosure is required by FOIA and hence is not prohibited by the Privacy Act.

2. When first presented with this issue in 1985, the FLRA held that federal agencies were prohibited by the Privacy Act from releasing employees' home addresses to unions. *Farmers Home Admin. Fin. Office*, 19 F.L.R.A. 195 (1985). A year later, the FLRA changed its position, in *Farmers Home Admin. Fin. Office*, 23 F.L.R.A. 788 (1986). Moreover, in the second *Farmers Home Administration* case the FLRA concluded that the agency was required to disclose employees' home addresses whether or not the union had adequate alternative means of communicating with members of the bargaining unit. Under FOIA Exemption 6, the FLRA balanced the employees' privacy interest in their home addresses against the enhancement of the collective bargaining process that would result from disclosure of home addresses, and held that the collective bargaining interest outweighed the privacy interest. 23 F.L.R.A. at 792-793. Several actions were filed based on the second *Farmers Home Administration* decision and, initially, a number of courts of appeals enforced orders requiring federal agencies to disclose the home addresses of federal employees.[1]

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[1] See *Department of Navy* v. *FLRA*, 840 F.2d 1131 (3d Cir.), cert. dismissed, 488 U.S. 881 (1988); *Department of Air Force, Scott Air Force Base* v. *FLRA*, 838 F.2d 229 (7th Cir.), cert. dismissed, 488 U.S. 880 (1988); *HHS* v. *FLRA*, 833 F.2d 1129 (4th Cir. 1987), cert. dismissed, 488 U.S. 880 (1988). The Eighth Circuit rejected the FLRA's position in part, holding that some employees have a sufficient privacy interest in their home addresses to prevent disclosure. *Department of Agriculture* v. *FLRA*, 836 F.2d 1139 (8th Cir. 1988), vacated on other grounds and remanded, 488 U.S. 1025 (1989). The Second Circuit had decided that the home addresses should be released even before the FLRA issued

However, in *FLRA* v. *Department of Treasury*, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990), the District of Columbia Circuit, which has concurrent jurisdiction over petitions for review of FLRA decisions (5 U.S.C. 7123(a)), declined to enforce an FLRA order requiring the disclosure of home addresses. In so holding, the D.C. Circuit relied on this Court's then-recent decision in *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). In *Reporters Committee*, this Court held that whether disclosure is warranted under FOIA "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny."'" *Id.* at 772, quoting *Department of Air Force* v. *Rose*, 425 U.S. 352, 372 (1976). The Court in *Reporters Committee* reasoned that FOIA "focuses on the citizens' right to be informed about 'what their government is up to,'" and held that that purpose "is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." 489 U.S. at 773 (citation omitted). The D.C. Circuit concluded that the release of home addresses of federal employees tells little or nothing about "what the government is up to," and accordingly held that the unions' interest in obtaining those home addresses did not "outweigh the workers' significant interest in privacy." 884 F.2d at 1453.

The D.C. Circuit specifically rejected the FLRA's contention that the interest in fostering collective bar-

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its second *Farmers Home* decision. *AFGE, Local 1760* v. *FLRA*, 786 F.2d 554 (2d Cir. 1986).

gaining should be weighed in the balance under FOIA Exemption 6. The court first noted that "*Reporters Committee* itself stated that 'the identity of the requesting party has no bearing on the merits of his or her FOIA request.'" 884 F.2d at 1453, quoting 489 U.S. at 771. The court added that "[t]he reading proposed by the Authority would in effect construe [Privacy Act exception (b)(2)] as encompassing disclosures required 'under FOIA *or any agency decision based on a disclosure-related statute*,'" and declined to "engage in the sort of imaginative reconstruction that would be necessary to introduce collective bargaining values into the balancing process." 884 F.2d at 1453.

In a concurring opinion, Judge Ruth Ginsburg questioned whether Congress actually intended to protect employees' home addresses from disclosure to unions, but concluded that "the logic of the court's opinion is irreproachable." 884 F.2d at 1457. She explained, first, that "[t]he broad cross-reference in 5 U.S.C. 7114(b)(4)—'to the extent not prohibited by law'—picks up the Privacy Act unmodified; that Act, in turn, shelters personal records absent the consent of the person to whom the record pertains, unless disclosure would be required under the Freedom of Information Act." 884 F.2d at 1457. "Once placed wholly within the FOIA's domain," Judge Ginsburg continued, "the union requesting information relevant to collective bargaining stands in no better position than members of the general public." *Ibid.* And she agreed that members of the general public have no right, under FOIA, to obtain lists of the home addresses of federal employees.

The FLRA declined to follow the D.C. Circuit's decision. In the *Portsmouth* case, *United States De-*

partment of the Navy, Portsmouth Naval Shipyard, 37 F.L.R.A. 515, 530 (1990), application for enforcement denied and cross-petition for review granted *sub nom. FLRA* v. *United States Dep't of the Navy*, 941 F.2d 49 (1st Cir. 1991), the FLRA "recognize[d] that exception (b)(2) of the Privacy Act makes no reference to laws other than the FOIA itself," but "disagree[d] with the conclusion of the D.C. Circuit that to introduce the purposes of another disclosure statute into the balancing required by FOIA would be an impermissible 'imaginative reconstruction.'" The FLRA also noted that private sector unions generally may obtain lists of names and home addresses of bargaining unit members, and concluded that "Federal sector employees should expect no greater privacy with respect to their exclusive representative * * * than private sector employees are accorded," even though "private sector employees are not covered by the Privacy Act as are * * * Federal employees." 37 F.L.R.A. at 536.

Turning to the balancing required under FOIA Exemption 6, the FLRA in *Portsmouth* recognized that federal unions may contact employees at work, but found home contact preferable because "[i]n the home environment, the employee has the leisure and the privacy to give the full and thoughtful attention to the union's message that the workplace generally does not permit." 37 F.L.R.A. at 532. The FLRA also "acknowledge[d] that any list of names and home addresses is subject to uses that may not have been contemplated when it was originally disclosed" (*id.* at 533), but found that the union's interest in contacting employees at home rather than at work outweighed the employees' privacy interest. Following its announcement of the *Portsmouth* decision, the

FLRA sought to create a conflict with the D.C. Circuit; in fact, the FLRA filed an enforcement action in each regional court of appeals.

3. The majority of the courts of appeals rejected the FLRA's position. *FLRA* v. *United States Dep't of Defense, Army & Air Force Exch. Serv.*, 984 F.2d 370 (10th Cir. 1993); *FLRA* v. *United States Dep't of Defense*, 977 F.2d 545 (11th Cir. 1992); *Department of Navy, Navy Exchange* v. *FLRA*, 975 F.2d 348 (7th Cir. 1992); *FLRA* v. *Department of Navy, Naval Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA* v. *United States Dep't of Veterans Affairs*, 958 F.2d 503 (2d Cir. 1992); *FLRA* v. *United States Dep't of the Navy, Naval Communications Unit*, 941 F.2d 49 (1st Cir. 1991). However, the Fifth Circuit enforced the FLRA's order requiring the disclosure of employees' home addresses in this case.[2]

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[2] Panels in the Ninth and Fourth Circuits had granted enforcement of FLRA orders requiring the disclosure of home addresses, but the Fourth Circuit panel's judgment was vacated, and a rehearing petition is pending in the Ninth Circuit. *FLRA* v. *United States Dep't of Navy, Navy Resale & Support Servs. Office*, 958 F.2d 1490 (9th Cir. 1992); *FLRA* v. *United States Dep't of Commerce, NOAA*, 954 F.2d 994 (4th Cir. 1992), vacated and reh'g granted (Apr. 22, 1992). The en banc Third Circuit also had upheld an FLRA disclosure order, but its holding was not based on FOIA Exemption 6. *FLRA* v. *United States Dep't of Navy, Navy Ships Parts Control Center*, 966 F.2d 747 (1992). The Third Circuit's decision instead was based on the court's conclusion that disclosure of home addresses was required by a "routine use" regulation promulgated by the Office of Personnel Management (OPM) (49 Fed. Reg. 36,949, 36,956 (1984)), even though OPM had interpreted its regulation to bar the release of home addresses unless there are no adequate alternative means of communicating with the members of the bargaining

The Fifth Circuit concluded that the seven circuits that rejected the FLRA's position "have read too much into *Reporters Committee*" (Pet. App. 18a), and distinguished this Court's decision in *Reporters Committee* on two grounds. First, the court stated, *Reporters Committee* involved a different FOIA privacy exemption, Exemption 7(C), which protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The court of appeals noted the differences between Exemption 6 and Exemption 7(C): while "Exemption 6 mandates that the invasion of privacy be '*clearly* unwarranted,' Exemption 7(C) requires that the invasion of privacy be merely 'unwarranted,'" and "while Exemption 6 applies to disclosures which 'would constitute' an invasion of privacy, Exemption 7(C) pertains to disclosures which 'could reasonably be expected to constitute'

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unit. The Third Circuit declined to rely on the OPM regulations, explaining that "until the OPM publishes its interpretation in a manner sufficient to place the public on notice of both the existence and content of that interpretation, we will not defer to the OPM's interpretation." 966 F.2d at 762. OPM subsequently published its interpretation in Federal Personnel Manual Letter 711-164. The FLRA has since recognized that "FPM Letter 711-164 governs interpretation" of the routine use regulation. *United States Dep't of the Treasury, Bureau of Alcohol, Tobacco & Firearms*, 46 F.L.R.A. No. 22 (Oct. 23, 1992), slip op. 10. Accordingly, there is no longer any basis for arguing that unions may obtain employees' home addresses under the routine use regulation in the normal case—such as this one—where unions may contact employees at work.

such an invasion." Pet. App. 19a-20a. The court, however, did not elaborate on the significance of those differences.

Second, the court of appeals stated that, unlike the requests in *Reporters Committee*, the unions' disclosure requests do not arise under FOIA, but originate from the Labor Statute and "its Congressionally endorsed framework for protecting and promoting collective bargaining." Pet. App. 20a. The court concluded that "*Reporters' Committee* is limited to the situation that arises when disclosure is sought under the FOIA alone." *Id.* at 23a. Once the interest in promoting collective bargaining is considered, the court held, "disclosure of the employees' names and addresses would not constitute a clearly unwarranted invasion of privacy, and is not prohibited by the Privacy Act." *Id.* at 26a. Thus, the court enforced the FLRA's order even though it "acknowledged that if one applies the restrictions announced in *Reporters' Committee*—confining cognizable interests in disclosure to those that open agency action to the light of public scrutiny—then disclosure clearly would be prohibited." *Id.* at 19a.

Judge Emilio Garza dissented. He noted that the Labor Statute provides that federal agencies must furnish unions with information "which is reasonably available and necessary for * * * collective bargaining," but further provides that they may do so only "to the extent not prohibited by law." 5 U.S.C. 7114(b)(4)(B). Since the Privacy Act would bar the release of employees' home addresses unless FOIA Exemption 6 requires disclosure, he reasoned this case turns on the latter question. Unlike his colleagues, Judge Garza found no basis for weighing

collective bargaining considerations in the balance under Exemption 6. Pet. App. 30a-34a & n.7. Judge Garza also found no merit to the suggestion that *Reporters Committee* may be distinguished because Exemption 6 differs in some respects from Exemption 7(C). He explained that "[t]he difference between Exemption[s] 6 and 7(C) goes *only* to the degree of personal privacy needed to outweigh the public interest," while "the public interest factor remains the same under both exemptions." Pet. App. 30a. Judge Garza concluded that disclosure of employees' home addresses is not warranted because release would not disclose anything about what the government is "up to," but would impinge on employees' right to privacy. *Id.* at 27a, 34a n.7.

SUMMARY OF ARGUMENT

It is undisputed that the release of employees' home addresses is barred by the Privacy Act unless disclosure is required by Exemption (b)(2), which authorizes disclosures mandated by FOIA. Accordingly, the focus of this case is on FOIA, and the result turns on what should be weighed on the disclosure side of the balance under FOIA Exemption 6. Contrary to the FLRA's contention, there is no basis for weighing collective bargaining interests in the balance under FOIA Exemption 6. No Privacy Act exemption provides for the release of information that is useful for collective bargaining purposes. Privacy Act Exemption (b)(2) instead directs attention to FOIA and only to FOIA. In *Reporters Committee*, this Court made clear that the purpose of FOIA is to make available "[o]fficial information that sheds light on an agency's performance of its statutory duties"

(489 U.S. at 773), and the Court further held that neither the identity of the requesting party nor the specific purpose of the request is relevant (*id.* at 771). Those principles make clear that there is no interest under FOIA favoring the release of information that facilitates collective bargaining but does not shed light on what the government is "up to."

On the other hand, the disclosure of employees' home addresses infringes substantial privacy interests. By itself, a home address may tell a lot about a person. Moreover, home address lists could be used by unions and others to contact federal employees at home, where many employees desire to be let alone. While the courts of appeals have differed with respect to their evaluation of the extent of the intrusion on privacy that results from the disclosure of federal employees' home addresses, all courts agree that disclosure compromises legitimate privacy interests to some extent.

Accordingly, as the Fifth Circuit acknowledged in this case (Pet. App. 19a), the interest in disclosure is outweighed by the employees' privacy interest if all that is weighed on the disclosure side of the balance under FOIA Exemption 6 is what the information says about what the government is "up to." Contrary to the FLRA's suggestions, there is nothing surprising or inequitable about that result. Unlike private sector employees, federal employees are protected by the Privacy Act, which was intended to protect personal information that happens to be in government files. Moreover, the FLRA has held that employees' home addresses must be released to unions no matter how much access unions have to employees at work. Since unions can always ask federal em-

ployees for their home addresses, the practical result of the Fifth Circuit's decision is limited to requiring the release of the home addresses of those employees who have chosen not to join unions, do not want to provide their addresses to unions, and prefer not to be contacted at home.

ARGUMENT

THE PRIVACY ACT PROTECTS THE HOME ADRESSES OF FEDERAL EMPLOYEES FROM DISCLOSURE

The disclosure of personal information held in government files is generally prohibited by the Privacy Act (5 U.S.C. 552a(b)), and it is not disputed that the home addresses of federal employees constitute personal information. Accordingly, the disclosure of employees' home addresses is barred by the Privacy Act unless the disclosure falls within Exception (b)(2) of the Privacy Act, 5 U.S.C. 552a(b)(2)—the provision authorizing the release of information "required under" FOIA. It does not. FOIA Exemption 6 prohibits the disclosure of information "which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Disclosure is not warranted because the release of employees' home addresses would impinge on the employees' interest in protecting the privacy of their homes without disclosing anything about what the government is "up to." *Reporters Committee*, 489 U.S. at 773.

A. The Relevant Public Interest In Disclosure Of Federal Employees' Home Addresses Is Insubstantial

Under FOIA Exemption 6, courts must balance the public interest in disclosure against the privacy

interest that would be compromised by disclosure. The key dispute in this case concerns what is weighed on the public interest side of the balance under FOIA Exemption 6. The Fifth Circuit candidly acknowledged that "disclosure of the employees' names and addresses * * * does not advance the public interest served by the FOIA—opening agency action to the light of public scrutiny." Pet. App. 18a. The court enforced the FLRA's disclosure order because it concluded that it was appropriate to consider "the public interest served by the [Labor Statute]—protection and promotion of collective bargaining." *Ibid.*

The court of appeals erred. Collective bargaining interests may not be weighed in the balance under FOIA Exemption 6, except through what the D.C. Circuit termed "imaginative reconstruction" of FOIA. *FLRA* v. *Department of Treasury*, 884 F.2d at 1453. It is true, as the Fifth Circuit emphasized (Pet. App. 20a), that the disclosure request in this case originated under the Labor Statute. But the Labor Statute expressly provides that agencies are to provide information to unions only "to the extent not prohibited by law" (5 U.S.C. 7114(b)(4)), and the Privacy Act is a law that generally prohibits the disclosure of personal information contained in agency files. No exception to the Privacy Act provides for the release of information that promotes collective bargaining. The only relevant exception to the Privacy Act (5 U.S.C. 552a(b)(2)) provides for the release of information required to be disclosed by FOIA, and nothing in FOIA provides for the release of information that promotes collective bargaining. Thus, while this case began with a re-

quest for information under the Labor Statute, that request is barred by the Privacy Act unless FOIA mandates disclosure.[3]

As Judge Ginsburg explained in her concurrence in the *Treasury* case, "[o]nce placed wholly within the FOIA's domain, the union requesting information relevant to collective bargaining stands in no better position than members of the general public." 884 F.2d at 1457. That conclusion is mandated by the terms of the relevant statutes. In the absence of FOIA, there would be no basis for the FLRA's argument that disclosure is warranted: the request would be barred by the Privacy Act, and no exception would even arguably apply. Exception (b)(2) of the Privacy Act arguably applies, but that exception authorizes the disclosure of information that must be released under FOIA and does not authorize release in any other circumstance. Thus, there is no statu-

[3] See *FLRA* v. *United States Dep't of Defense, Army & Air Force Exch. Serv.*, 984 F.2d at 374-375; *FLRA* v. *United States Dep't of Defense*, 977 F.2d at 548 ("[W]e find no authority for allowing Labor Statute principles to override FOIA principles and, in turn, the Privacy Act. Such an interpretation contravenes the Labor Statute's own rule that disclosure be allowed only 'to the extent not prohibited by law.' "); *United States Dep't of Navy, Navy Exchange* v. *FLRA*, 975 F.2d at 354 ("[n]either [the Privacy Act], nor FOIA, makes a further exception for information requests that originate under some other federal statute"); *FLRA* v. *Department of Veterans Affairs*, 958 F.2d at 512 ("[n]owhere do we find a qualification that the policies of collective bargaining should be integrated into FOIA"); *FLRA* v. *United States Dep't of Navy, Naval Communications Unit*, 941 F.2d at 57, n.11 ("[w]e decline * * * to alter clear principles of FOIA analysis by an imaginative reading of the Labor Statute's plain requirement that the disclosure not be 'prohibited by law' ").

tory basis on which to construct two FOIA tests, one for requests arising under FOIA and one for requests originating under the Labor Statute.

Courts "are not at liberty to create an exception where Congress has declined to do so." *Freytag* v. *Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2636 (1991). See also *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992) ("[i]n a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished"). Congress created no exception to the Privacy Act authorizing the release of information that promotes collective bargaining, and the FLRA's decision to read such an exception into the Privacy Act is not entitled to deference. *FLRA* v. *Department of Treasury*, 884 F.2d at 1451 (citations omitted) ("[a]s the FLRA is not charged with a special duty to interpret either the Privacy Act or the FOIA, we do not defer to its interpretations of those statutes but review them *de novo*"); see also *Department of Navy* v. *FLRA*, 840 F.2d 1131, 1134 (3d Cir.), cert. dismissed, 488 U.S. 881 (1988); *West Point Elementary School Teachers Ass'n* v. *FLRA*, 855 F.2d 936, 940 (2d Cir. 1988) ("an FLRA decision is not entitled to * * * deference when it interprets a statute other than the [Labor Statute] or resolves a conflict between the [Labor Statute] and another statute").

The conclusion that a union requesting home addresses under FOIA is in no better position than anyone else requesting the same information necessarily follows from this Court's decision in *Reporters Committee*. This Court made clear that "the identity

of the requesting party has no bearing on the merits of his or her FOIA request," and that "the purposes for which the request for information is made" are not relevant. 489 U.S. at 771. The Fifth Circuit's decision, which is premised on the fact that a union requested the employees' home addresses for the purpose of advancing collective bargaining interests, cannot be reconciled with this Court's holding that neither the identity of the requester nor the purpose of the request is relevant under FOIA.

That conclusion is not affected by the fact that *Reporters Committee* did not involve a request for information that arose under the Labor Statute. Just as nothing in FOIA suggests that it is appropriate to consider the public interest in promoting collective bargaining, nothing in the Labor Statute suggests that its purposes find their way into the balance under FOIA Exemption 6. As the Second Circuit explained: "Nowhere in the [Labor Statute] does its language indicate that the disclosure calculus required by FOIA should be modified. Nowhere do we find a qualification that the policies of collective bargaining should be integrated into FOIA." *FLRA* v. *United States Dep't of Veterans Affairs*, 958 F.2d at 512. All that is found in the Labor Statute is a direction to disclose information pertinent to collective bargaining "to the extent not prohibited by law." 5 U.S.C. 7114(b)(4).

Nor is *Reporters Committee* distinguishable because it involved FOIA Exemption 7(C) rather than FOIA Exemption 6. As Judge Garza explained in his dissenting opinion below, Exemption 7(C) is more protective of privacy interests than is Exemption 6: Exemption 7(C) bars any disclosure that "could reasonably be expected to constitute" an invasion of privacy that is "unwarranted," while Exemption 6 bars any disclosure that "would constitute" an invasion of privacy that is "clearly unwarranted." But the relevant teaching of *Reporters Committee* relates to determining what is to be weighed on the public interest side of the balance. Pet. App. 30a.[4] Thus, *Reporters Committee* is relevant in this case because it makes clear that there is very little or nothing on the disclosure side of the balance. In a case arising under Exemption 6, a more substantial privacy interest may be required to outweigh an interest in disclosure than in a case arising under Exemption 7(C), but that difference is not relevant to determining what interests are to be placed on the public interest side of the scale.

What is weighed on the disclosure side of the balance under FOIA Exemption 6 was spelled out in this Court's decision in *Reporters Committee*— "[o]fficial information that sheds light on an agency's performance of its statutory duties." 489 U.S. at 773. At the same time, the Court made clear that the "disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's conduct" is not permitted, because such information says little or nothing about what the government is "up to." *Ibid.* In other words, whether disclosure is warranted "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act "to open agency

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[4] In *United States Dep't of State* v. *Ray*, 112 S. Ct. 541, 549 (1991) (quoting *Reporters Committee*, 489 U.S. at 773, and *Rose*, 425 U.S. 352 360-361 (1976)), an Exemption 6 case, this Court recognized that FOIA "'focuses on the citizens' right to be informed about "what their government is up to."'"

action to the light of public scrutiny.'" " *Id.* at 772, quoting *Department of Air Force* v. *Rose*, 425 U.S. 352, 372 (1976). The Fifth Circuit acknowledged in this case that "[r]elease of the employees' names and addresses would not in any meaningful way open agency action to the light of public scrutiny." Pet. App. 19a.

B. The Disclosure Order Infringes Employees' Privacy Interests

In *Reporters Committee*, this Court also concluded that "privacy encompass[es] the individual's control of information concerning his or her person." 489 U.S. at 763. Indeed, the Court recognized that control over information is at the heart of the legal concept of privacy. See *id.* at 762-764 & n.16. Accordingly, the Court held that the subject of a "rap sheet" had a significant privacy interest in restricting its dissemination, even though the information on the rap sheet was public knowledge. The courts of appeals subsequently have properly recognized that Exemption 6 is not limited to "embarrassing" or "intimate" information, but involves an individual's interest in limiting the dissemination of any personal information. See, *e.g.*, *Hopkins* v. *United States Dep't of HUD*, 929 F.2d 81, 87 (2d Cir. 1991); *National Ass'n of Retired Fed. Employees* v. *Horner (NARFE)*, 879 F.2d 873, 875 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990).

The information at issue in this case involves one of the chief bastions of privacy—the home. See *Rowan* v. *United States Post Office Dep't*, 397 U.S. 728, 737 (1970) ("[t]he ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality"). Federal employees reasonably may wish to control access to their home addresses. As an initial matter, "an address tells much more than just where a person lives." *FLRA* v. *United States Dep't of Defense*, 977 F.2d at 549. By releasing an employees' home address, the agency would be disclosing not only the address itself, but also information concerning the location of the employee's home, the type of neighborhood the employee lives in, and perhaps even the lifestyle or affluence of that employee. Thus, the disclosure of a list of names and home addresses, by itself, reveals significant personal information.

Moreover, the right to be free from unwanted intrusions in one's home should not be minimized. In his dissent in *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928), Mr. Justice Brandeis characterized "the right to be let alone" as the "right most valued by civilized men." Many people do not want to be disturbed by work-related matters at home. In particular, many federal employees who have not joined a union do not want to be disturbed at home by union officials. For example, in *Veterans Administration, Riverside National Cemetery*, 33 F.L.R.A. 316, 317 (1988), 22 of the 34 members of the bargaining unit asked the agency to keep their home addresses confidential. (The FLRA ordered their release to the union anyway.) Some federal employees have specific reasons for keeping their home addresses out of union hands. For example, in *Department of the Navy, U.S. Naval Ordnance Station*, 33 F.L.R.A. 3, 5 (1988), an employee wanted his home address to be kept private because he had been threatened at home by a union member. (The FLRA nevertheless ordered the release of the home addresses of all members of the bargaining unit, be-

cause it concluded that there was no evidence of "imminent danger.") Thus, even if home address lists were available only to unions, significant privacy interests would be compromised.

But there is no basis for restricting disclosure to unions. First, as the FLRA acknowledged in its *Portsmouth* decision, "any list of names and home addresses is subject to uses that may not have been contemplated when it was originally disclosed." 37 F.L.R.A. at 533. In other words, as a practical matter, once home addresses are released to a union there is no assurance that the union or its members may not further disseminate the list. *FLRA* v. *United States Dep't of Defense*, 977 F.2d at 549 n.6; *FLRA* v. *United States Dep't of Veterans Affairs*, 958 F.2d at 511 ("granting disclosure here would threaten a privacy interest because it would be impossible to assure that the uses to which the employee list would be put by the union would be limited to those contemplated by the parties' relationship"); *FLRA* v. *United States Dep't of Treasury*, 884 F.2d at 1452. Second, as we have explained, there is no basis on which to construct one FOIA test for unions and another for other requesters. Thus, if the information "must be released to one requester, it must be released to all, regardless of the uses to which it might be put." *Painting & Drywall Work Preservation Fund, Inc.* v. *Department of HUD*, 936 F.2d 1300, 1302 (D.C. Cir. 1991); accord *FLRA* v. *United States Dep't of Veterans Affairs*, 958 F.2d at 510-511.

Because home address lists communicate specific traits shared by a community of federal employees, they have considerable commercial value to businesses, solicitors, marketing experts, insurance com-

panies, social scientists, pollsters, and others, and there would be no shortage of prospective users of such lists. As the D.C. Circuit observed in *NARFE*, "one need only assume that business people will not overlook an opportunity to get cheaply from the Government what otherwise comes dearly" in order to recognize that many such prospective users would seek home address lists. 879 F.2d at 878.[5] In the *Treasury* case, the D.C. Circuit correctly concluded that, if employees' home addresses are disclosed, employees may be exposed to unwanted barrages of mailings and solicitations from businesses and fund-raising organizations, as shown by the numerous FOIA requests that have been filed by entrepreneurs seeking to contact government employees. 884 F.2d at 1452.

Various courts of appeals have accordingly held that the release of employees' home addresses would compromise substantial privacy interests. See *FLRA* v. *Department of Navy, Naval Communications Unit*, 941 F.2d at 58; see *id.* at 55-56 ("we believe a discernible interest exists in the ability to retreat to the seclusion of one's home and to avoid enforced disclosure of one's address"); *NARFE*, 879 F.2d at 875 ("the privacy interest of an individual in avoiding the unlimited disclosure of his or her name and address is significant"); *FLRA* v. *United States Dep't of Veterans Affairs*, 958 F.2d at 510 ("an individual has a general privacy interest in prevent-

[5] In *United States Dep't of State* v. *Ray*, 112 S. Ct. 541, 548 n.12 (1991), this Court quoted the *NARFE* decision, "agree[ing] with the Court of Appeals for the District of Columbia Circuit that whether disclosure of a list of names is a '"significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue."'"

ing dissemination of his or her name and home address"); *United States Dep't of Navy, Navy Exchange* v. *FLRA*, 975 F.2d at 353 ("we hold that federal employees have a privacy interest in the nondisclosure of their names and home addresses"); *FLRA* v. *United States Dep't of Defense*, 977 F.2d at 549 ("we think the privacy interest in a home address is important"). Even the Fifth Circuit in this case, while discounting the privacy interest affected by disclosure, acknowledged that federal employees have "at least some legitimate interest in keeping private their names and home addresses." Pet. App. 12a.

C. The Privacy Interests Compromised By Disclosure Of Employees' Home Addresses Outweigh the Relevant Public Interest In Disclosure

It is essentially undisputed that federal employees' interest in protecting the privacy of their homes outweighs the interest in disclosure unless the interest in promoting collective bargaining is included in the balancing. That is, it is clear that federal employees have a privacy interest in controlling access to their addresses, while the release of those addresses says very little or nothing about how the government is doing its work. Thus, as the Fifth Circuit stated in this case, "if one applies the restrictions announced in *Reporters' Committee*—confining cognizable interests in disclosure to those that open agency action to the light of public scrutiny—then disclosure clearly would be prohibited." Pet. App. 19a.

Contrary to the FLRA's contentions, there is nothing surprising or inequitable about that conclusion. In *Reporters Committee*, this Court noted that "disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." 489 U.S. at 765. Cf. *id.* at 767 (discussing the Privacy Act's reflection of "Congress' basic policy concern[s] regarding the implications of computerized data banks for personal privacy"). See also *Whalen* v. *Roe*, 429 U.S. 589, 605 (1977) ("We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. * * * The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures."). What would be surprising would be if the Labor Statute and the Freedom of Information Act were construed to convert the federal government into a clearinghouse for the release of the vast array of private information necessarily held in government files. Congress enacted the Privacy Act to prevent such abuses.

It appears, however, that the FLRA has significantly undervalued the privacy rights of federal employees. It has extended its *Portsmouth* decision beyond home addresses to require the release of various sorts of personal information about federal employees. For example, the FLRA has ordered the release of unsanitized employee disciplinary files and performance ratings and appraisals. See, *e.g.*, *Department of Labor* v. *FLRA*, 39 F.L.R.A. 531 (1991), remanded on other grounds, No. 91-1174 (D.C. Cir. Order of Jan. 7, 1992) (unredacted suspension records); *FLRA* v. *Department of Commerce*, 38 F.L.R.A 120 (1990), rev'd, 962 F.2d 1055 (D.C. Cir. 1992) (names and duty stations of employees receiving outstanding or commendable ratings); *Department of HHS* v. *FLRA*, 43 F.L.R.A. 164 (1991),

rev'd, No. 92-1012 (D.C. Cir. Dec. 10, 1992) (unsanitized performance appraisals). Moreover, the FLRA has required bargaining over the release of unsanitized notices stating that an agency suspects that a particular employee is abusing drugs. Those notices would be released to a union without the consent of the employees to whom the notices are issued. *Department of Energy* v. *FLRA*, 41 F.L.R.A. 1241 (1991), appeal pending, No. 91-1514 (D.C. Cir.).

Contrary to the FLRA's suggestions, it is not the case that Section 7114(b)(4)(B)—the provision in the Labor Statute requiring agencies to provide, "to the extent not prohibited by law," information that is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining"—would be a dead letter under our view. First, most of the information requested by unions under Section 7114(b)(4)(B) either does not concern individual employees at all or does not impinge upon their privacy. Examples include the disclosure of general information concerning conditions of employment; information on facilities; data on health and safety matters; memoranda on reorganizations, reductions-in-force, and work schedules; and statistical information on seniority.[6] Most of that type of information is released

[6] See, *e.g.*, *Department of Justice, United States Immigration & Naturalization Service*, 23 F.L.R.A. 239 (1986) (daily assignment and equipment logs released); *United States Dep't of Defense, Dep'ts of the Army & the Air Force*, 19 F.L.R.A. 652 (1985) (the union received information relating to which components were planning personnel reductions). Although management asserted other reasons for noncompliance with the specific requests (*e.g.*, the request was burdensome or the information was unavailable), in neither case was a question raised concerning any privacy interest.

as a matter of course without any controversy or litigation, and the decision in this case will not affect such disclosures. It is only in those instances when information about specific individuals is requested, and the individuals do not consent to the release of the information, that a determination must be made as to whether disclosure would violate the Privacy Act. Moreover, relevant records concerning disciplinary actions, overtime, grievances, leave, and travel often can be released to unions in a sanitized fashion, thus protecting the privacy interests of the individual employees while at the same time assisting the unions in performing their collective bargaining duties.[7]

In its *Portsmouth* decision, the FLRA put great weight on the fact that private sector unions almost always obtain home address lists, and concluded that "Federal sector employees should expect no greater privacy * * * than private sector employees are accorded." 37 F.L.R.A. at 536. But the Labor Statute "is not a carbon copy of the NLRA, nor is the authority of the FLRA the same as that of the NLRB." *Karahalios* v. *NFFE, Local 1263*, 489 U.S. 527, 532, 534 (1989). See also *Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 648 (1990) (the National Labor Relations Act and Postal Reorganization Act "deal with labor-management relations in entirely different fields of employment, and the [Labor Stat-

[7] See *Veterans Admin. Medical Center*, 32 F.L.R.A. 133 (1988) (union acknowledged that it would be satisfied to receive the statistical information without names); *Department of Defense Dependents Schools, Washington, D.C. & Dep't of Defense Dependents Schools, Germany Region*, 28 F.L.R.A. 202 (1987) (union indicated that it had no objection to receiving sanitized documents).

ute] contains no indication that it is to be read *in pari materia* with them"). Indeed, there are many important differences between federal employees and private sector employees. For example, federal employees are not allowed to strike (5 U.S.C. 7116 (b)(7)) and most cannot bargain about wages, which are set by Congress (see 5 U.S.C. 7102(2), 7103(a)(14)). Public employees also enjoy protections—notably those provided by the Bill of Rights—that do not restrict private sector employers. Among the statutory protections accorded federal employees is coverage under the Privacy Act, which applies only to public agencies. Moreover, the Labor Statute expressly provides that its disclosure provision does not override employees' Privacy Act rights, since disclosure is warranted under Section 7114(b)(4) only "to the extent not prohibited by law." The FLRA did not suggest in *Portsmouth* how that statutory command could be reconciled with its conclusion that federal employees' privacy rights must be limited to those of private sector employees.

Moreover, federal labor unions generally have ample opportunities to contact employees at work. There is no evidence that there are inadequate opportunities for contact at work in this case, where the agencies have provided lists of the work stations of the members of the bargaining units. See C.A. App. 58, 60, 113.[8] In addition, any union may negotiate

[8] In the unusual situation where unions do not have sufficient opportunities for contact at work, applicable regulations provide that most federal agencies must make arrangements to allow unions to contact employees at home. See 49 Fed. Reg. 36,949, 36,956 (1984); Federal Personnel Manual Letter 711-164; note 2, *supra*. Those regulations do not apply to employees of military exchange services, however.

for additional rights to contact federal employees at work and, in contrast to the private sector, such proposals may be imposed on agencies over their objection by the Federal Service Impasses Panel, which is part of the FLRA. See 5 U.S.C. 7119(c)(5). Thus, any federal union may ensure that it will have ample opportunities to contact employees at work. There is no reason why, during such contacts, the unions cannot ask the employees for their home addresses. Of course, the unions would not obtain the home addresses of those employees who did not want the union to have them. But the fact that individual federal employees may choose to exercise the rights Congress conferred on them in the Privacy Act is hardly a reason to abrogate those rights.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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